IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.404 OF 1991

1. M/s.Indian Hotels Co. limited, a company incorporated under the Companies Act, and having its registered office at Taj Mahal Hotel, Apollo Bunder, Bombay 400 039

2. Naushad Noormohamed Noorani of Bombay Indian Inhabitant residing at 63/64, Dadabhoy Road, Andheri (west), Bombay 400 058 .. Petitioners.

V/s.

1. The Employees' State Insurance Corporation, ESIC Building, Shahid Bhagat Singh Road, Colaba, Bombay 400 005

2. Dy. Regional Director, Employees State Insurance Corporation, ESIC Building, Colaba, Bombay - 400 005.

3. Union of India .. Respondents.

Mr.K.B. Irani with Mr.R.K. Satpalkar i/b. Mulla & Mulla for the petitioners.
Mr.Rajan Jaykar i/b. M.V. Jayakar & Co. for respondent No.1.
Mr.H.V. Mehta i/b. T.C. Kaushik for respondent No.3 / Union of India.

CORAM : R.M. LODHA &
J.P. DEVADHAR, JJ.

DATED : 24TH JUNE, 2005.

ORAL JUDGMENT : (Per R.M. Lodha, J.)

The first petitioner is the owner of the hotels known as Taj Mahal Hotel and Taj Mahal

Intercontinental situated at Apollo Bunder, Mumbai. The second petitioner is the shareholder of the first petitioner company. The first petitioner is a commercial establishment and is covered by The Employees' State Insurance Act, 1948 (for short 'the Act of 1948'). The petitioner's case is that the first petitioner is regularly paying the ESI contribution for and on behalf of his employees. On or about 24.06.1985 the first petitioner entered into a settlement with the Union representing its workmen. By this settlement the first petitioner agreed to give a further sum of Rs.500/- per month to each employee as and by way of Attendance Linked Incentive (for short 'ALI'). The said settlement became operative w.e.f. the month of April, 1985. The first petitioner averred that in or about the month of December, 1986 it was realised for the first time that 1029 employees were possibly not covered by the Act of 1948 and the payment of contribution in regard to these 1029 employees was by mistake. The first petitioner brought the fact of excess payment to the notice of the Regional Director, Employees' State Insurance Corporation, Bombay vide letter dated 29.01.1987 and requested for refund or adjustment against the amount due from them in future. The Deputy Regional Director, Employees' State Insurance Corporation (for short 'ESI') in its letter dated

19.02.1987 agreed that any payment made as ALI is covered by wages under Section 2 (22) of the Act of 1948 and the said amount will be included for the purposes of determining the coverage of an employee under Section 2(9). The Deputy Regional Director also invited the attention of the first petitioner to Regulation 40 of Employees State Insurance (General) Regulations, 1950 (for short 'Regulations of 1950') and stated that if a person has paid the contributions under erroneous belief that they were payable, it can be refunded if the application to that effect is submitted in writing to the ESI before the commencement of the benefit period corresponding to the contribution period in which such contributions have been paid. He also informed the first petitioner that for the contribution period commencing from 01.10.1986 the refund application must be before 01.07.1987 giving full details in respect of each of the persons from whom the contributions have been paid in excess. The application so made shall need factual verification by the Corporation. However, the first petitioner did not furnish full details in respect of each of the persons allegedly for whom the contributions were paid by the first petitioner in excess.

2. By notice dated 18.09.1989, the Deputy

Regional Director called upon the first petitioner to show cause why the assessment should not be made as proposed in the notice and if they have any objections the same may be submitted on or before the time mentioned in the notice. The first petitioner did not show any cause. That led to an order under Section 45-A of the Act of 1948 by the Regional Director dated 14.12.1999. By the said order under Section 45-A it was held that the first petitioner failed to pay the contributions totalling to Rs.26,92,078/- for the period from April 1985 to November 1987. The contributions along with interest were finally determined to the tune of Rs.26,92,078/-. The first pensioner was also directed to pay interest.

3. The first petitioner made a representation on March 6/7, 1990 against the order dated 14.12.1989 passed by the Deputy Regional Director under Section 45-A of the ESI Act. In the said representation, inter alia the first petitioner set up the case that an excess amount of Rs.13,87,897.70 was paid towards ESI contributions and that amount was liable to be refunded or adjusted from future contributions.

4. The aforesaid representation made by the first petitioner was rejected by the Deputy Regional

Director on 14.08.1990 and the first petitioner was called upon to make payment of Rs.4,10,978.50 which was due and payable.

5. In the backdrop of the aforesaid facts, the petitioners have approached this Court and prayed that Regulation 40 of the Regulations of 1950 be struck down and that the respondents be directed to refund to the petitioners a sum of Rs.13,97,897.70 with the interest @15% per annum from the date of erroneous recovery by the respondent till the date of actual payment.

6. The petitioners seek to challenge the vires of Regulation 40 on the grounds that it is contrary to the constitutional mandate of Article 265 and 300A of the Constitution of India. That the Act of 1948 has the purpose, scope and object to provide for benefits of the employees in case of sickness, maternity, employment injury and provisions have been made relating thereto. The Act of 1948 is not aimed at recovering monies which are not legitimately due and payable. Regulation 40 which seeks to bar the employer from recovering monies paid under mistake and mis-apprehension of law, is contrary to law and inconsistent with the Act of 1948. It is the case of the petitioners that in the guise of regulations

which are in the nature of subordinate legislation, the ESI Corporation cannot get a right which is not provided by the Act of 1948. That in the garb of framing regulation 40 in exercise of powers under Section 97 of the Act of 1948, the right of refund of the tax paid by mistake cannot be curtailed by providing lesser period of limitation than provided in the Limitation Act, 1964.

7. Mr.K.B. Irani, the learned counsel for the petitioners relied upon the following judgments, (i) Mahabir Kishore & Others V/s. State of M.P. [(1989) 4 SCC 1], (ii) M/s.Shiv Shankar Dal Mills V/s. State of Haryana & Others [AIR 1980 SC 1037], (iii) Salonah Tea Co. Ltd. & Ors. V/s. Superintendent of Taxes, Nowgong & Ors. [(1988) 1 SCC 401], (iv) Anil Textile Industry V/s. Employees' State Insurance Corporation [1999 III LLJ (supp) Raj. 203] and (v) Regional Director, The Employees State Insurance Corporation V/s. Shashikant & Anr. [1984 LAB I.C. 527 (Bom)].

8. In opposition to this writ petition, two affidavits have been filed. One affidavit is by the Deputy Regional Director and the other is by the Assistant Director (Law). It is the respondents' case that the Act of 1948 is within the legislative competence of the Parliament. Regulation 40 does not

suffer from any constitutional infirmity as Regulations of 1950 were framed in exercise of the power given by the Act of 1948 under Section 97 thereof. All contributions collected from the employees (whether rightly paid or paid through mistake) are pooled together in central pool out of which benefits as provided in the Act are given to the insured persons. That it is not possible to identify out of which contributions particular individual was paid the benefits as no separate accounts are made and it is not possible to ascertain the benefits paid after lapse of time if any payment is made through mistake. According to the respondents, the limitation placed in Regulation 40 cannot be equated with the limitation in respect of the judicial or quasi judicial functions exercised by the Corporation under Section 45-A, 45-B and Sec.85-B of the Act. It is their case that neither Article 14 of the Constitution is infracted by Regulation 40 nor any other constitutional provision. On facts, it is stated by the respondents that 'ALI' required to be paid by the first petitioner by way of additional remuneration under the settlement dated 24.06.1985 is dependent upon the attendance of the employer in a month and that if the employee has attended the duty only for 8 days, 10 days or 15 days in a month, as the case may be, his salary in that month may not

cross Rs.1,000/- per month and, hence the employer inspite of adding the amount of 'ALI' will be covered by the provisions of the Act of 1948 in the respective month as he was paid wages less than Rs.1,600/- per month including 'ALI' payment dependent upon the attendance of his duty. That the first petitioner cannot on ad hoc basis claim refund of excess contribution in respect of 1029 employees. The first petitioner is required to furnish details in form C-3 prescribed under Regulation 45-A of the Regulations of 1950. The petitioners have not furnished any details before the commencement of the benefit period in form C-3 to enable the Corporation to determine the amount of excess contribution. In other words, the respondents are disputing for refund of contribution since they are disputing the petitioners claim of excess payment of contribution.

9. It may be noticed here that the petitioners have already preferred an application No.120 of 1990 challenging the order dated 14.08.1990 passed under Section 45-A of the Act of 1948. That application ought to be taken to the logical conclusion. The learned counsel for the petitioners also admitted that the application made by the petitioners is still pending but he argued that the validity and vires of Regulation 40 cannot be gone into that application

and, therefore, this aspect needs to be decided by this Court.

10. The question that falls for consideration before us is, whether Regulation 40 of the Employees' State Insurance (General) Regulations, 1950 is unconstitutional and ultra vires the provisions of the Act of 1948.

11. The Act of 1948 is a beneficial legislation. It provides for certain benefits to the employees in the case of sickness, maternity and employment injury etc. We shall briefly survey the provisions of the Act of 1948 for proper appreciation of the issue raised before us. Section 2 provides for definitions of various expressions occurring in the Act. Sections 3 to 25 provide for establishment of the Employees State Insurance Corporation, Constitutional Standing Committee and Medical Benefit Council. Section 26 provides that all contributions paid under the Act and all the monies received on behalf of the Corporation shall be paid into a fund called State Government Employees State Insurance Fund. Such fund is held and administered by the Corporation for the purposes of this Act. Section 28 contemplates that the Employees State Insurance Fund shall be expended for the purposes mentioned therein. Section 38

covers the employees in the factories and establishments to which the Act is applicable. Section 39 envisages contributions to be paid by the employer and employees as per the rate fixed by the Central Government. Section 40 contemplates every employer to pay contribution in the first instance. Section 41 provides for recovery of contribution from immediate employer. Section 44 obligates employers to furnish returns and maintain register under certain cases. Determination of contribution is made under Section 45-A and the recovery of contributions is made under Section 45-B. Section 46 provides for the benefits stated therein to the insured persons, their dependants etc. subject to the provisions of the Act. Section 49 provides for sickness benefit while Sections 50 and 51 provide for disabled benefits. Under Section 74 Employees Insurance Court is constituted and Section 75 enumerates the matters to be decided by the Employees Insurance Court. The penalties are provided under Sections 84 to 86A. Section 95 empowers the Central Government to make rules while Section 96 empowers the State Government to make rules. The power of making regulations by the Corporation is given under Section 97. It provides that the Corporation may make regulations not inconsistent with the Act and the rules made thereunder for the administration of the office of

the Corporation and for giving effect to the provisions of the Act. Sub-clause (2) of Section 97 provides for the matters for which the regulations can be made by the Corporation. The regulations so made by the Corporation are published in the Gazette of the Government of India and thereupon it comes into effect. Every regulation after it is made by the Corporation is forwarded to the Central Government. The Government causes a copy of the same to be laid before each House of Parliament, while it is in session for a total period of thirty days. The Parliament can modify and annul the regulation, as the case may be.

12. Having surveyed very briefly the provisions of the Act of 1948, we shall not advert to Article 265 of the Constitution of India which provides that no tax shall be levied or collected except by authority of law. Article 265 of the Constitution of India is declaratory in nature. It does not lay down any criteria for testing the validity of the Constitution. When the validity of law is to be determined, it has to be so done with reference to the other provisions of the Constitution.

13. What is principally contended by the learned counsel for the petitioners is that under Section 97

of the Act of 1948 the regulations can be made by the Corporation which are not inconsistent with the Act. The Act does not permit for detention of the amount not legally recoverable and, therefore, the Corporation cannot frame such regulation. Incidental to this, it is also contended that it is only under Section 43 of the Act of 1948 that regulations for contribution can be framed.

14. The contentions do not impress us. Regulation 40 cannot be said to be inconsistent with the provisions of the Act. It is so because it provides for refund of the contributions made under mistake. It provides that any contribution paid by a person under erroneous belief that the contribution were payable by the person under the Act may be refunded without interest by the Corporation to that person. How can such provision which provides for refund of contribution/s erroneously paid can be said to be inconsistent with the Act. Section 97 empowers the Corporation to make regulations for the administration of the affairs of the Corporation and for carrying the effect of the Act. By providing for refund of contribution/s and providing procedure therein for the refund in our opinion cannot be said to be inconsistent. Section 39 of the Act makes the provision for contribution. It provides that the

contribution payable under the Act in respect of an employer shall comprise contribution payable by the employer and contribution payable by the employee. Section 40 provides for principal employer to pay contribution in the first instance. If the contribution that is not payable by the employer under the Act has been paid erroneously under mistake and the provision has been made by making regulations that such contribution which has been erroneously paid by a person shall be refunded to him, by no stretch of imagination, can it be said that it is inconsistent with the Act. Rather it is consistent with the scheme of the Act.

15. The contention that Section 43 provides for method of payment of contribution and that the regulations for refund could only be made under Section 43 of the Act and not under Section 97 is only noted to be rejected. It is true that Section 43 provides that the Corporation may make regulations for the matters relating to payment and calculation payable under the Act of 1948 but the matters for which the regulations can be made under Section 43 are confined to Clauses (a) to (d). Moreover, Section 43 does not take away the general power of framing Regulations by the Corporation under Section 97 of the Act of 1948. Sub-section (1) of Section 97

as is already noticed by us provides that the Corporation may make regulations for the administration of the affairs of the Corporation and for carrying into effect the provisions of the Act. Without prejudice to the generality of its power, inter alia it provides for matters contained therein including any matter in respect of which regulations are required or permitted to be made by the Act of 1948. The plea of inconsistency having been negated by us, it cannot be said that the regulations made by the Corporation for refund are beyond the competence of the Corporation under Section 97 of the Act of 1948. Sub-section (4) of Section 97 provides that the regulation made by the Corporation shall be forwarded to the Central Government and the Central Government shall cause a copy of the same to be laid before each House of Parliament while it is in session for total period of thirty days. It is not the case of the petitioners that the Employees' State Insurance (General) Regulations, 1950 framed by the Corporation were not laid before both the Houses of the Parliament or that the Parliament modified or annulled any of the provisions of Regulations, 1950. In so far as regulation 40 is concerned it is part of the original regulations made in the year 1950 and there is nothing on record that the said regulation was modified or annulled by the Parliament.

16. The contention that the period provided for making an application for refund before commencement of the benefit period corresponding to the contribution period in which the contribution was paid is violative of Article 14 of the Constitution of India is also not meritorious. All contributions collected whether rightly paid or paid through mistake are pooled together in a central pool out of which all the benefits as provided in the Act are made to the insured persons. Keeping in view the special provisions of the scheme, the benefit Fund and the contributions being pooled together, the period providing for making an application in regulation 40 has nexus with the objects of the Act and the said period cannot be said to be violative of Article 14 of the Constitution of India.

17. We find that the judgments cited by the learned counsel for the petitioners are not of much help.

18. In Shashikant (supra), the Division Bench of this Court held that Section 5 of the Limitation Act applies to the application made under Rule 26(5) of the Bombay Employees Insurance Court Rules, 1959. We are unable to find the relevance of this judgment

cited by the learned counsel for the petitioners.

19. In Mahabir Kishore (supra), the issue before the Supreme Court was whether the plaintiffs suit in that case was rightly dismissed on the point of limitation. The challenge was to 7.5% of the mahua and fuel cell and refund of the amount illegally collected by the Government of Madhya Pradesh towards mahua and fuel cell. The Supreme Court observed that the suit was for refund of money paid by mistake and refusal to refund would result in unjust enrichment. It was held that in a suit for refund of money paid by mistake of law, Section 72 of the Contract Act is applicable and the period of limitation is three years as prescribed by Article 113. The provisions of Section 17(1)(c) of the Limitation Act was applicable as the period would begin to run from the date of knowledge of the mistake whereunder the money was paid. In the backdrop of these facts, the Supreme Court set aside the judgment of the Madhya Pradesh High Court and remanded the suit for fresh consideration. The judgment of the Supreme Court in the case of Mahabir Kishore has no relevance to the issue with which we are concerned.

20. In M/s.Shiv Shankar Dal Mills (supra), the Supreme Court considered the nature and extent of

writ jurisdiction in the matters of refund of illegal recovery of market fee to dealers. This judgment is not even remotely relevant for the issue raised in the present writ petition about the constitutional validity of regulation 40.

21. In the case of M/s.Bharat Barrel & drum Mfg. Co. Private Limited, the Supreme Court held that Section 96(1)(b) of the Act of 1948 does not empower the State Government to prescribe period of limitation for claim under Section 75. Rule 17 framed by the Bombay Government prescribing limitation for filing application under Section 75 was held ultra vires Section 96(1)(b). The question before the Supreme Court was whether the power to prescribe the period of limitation for initiating proceedings before the Court was a part of and was included in the power to prescribe the procedure to be followed in proceedings before Insurance Courts. The Supreme Court held that Section 78(2) does not delegate any power to the Government to make rules but only requires the Insurance Court to follow such procedure as may be prescribed by rules made by the State Government which rules can only be made under Section 96 of the Act. Regulation 40 made by the Corporation has nothing to do with the period of limitation for initiating proceedings before the

court. Regulation 40 provides for refund of contribution erroneously paid and the procedure and limitation thereof which we have already held is not inconsistent with the provisions of the Act and within the competence of the Corporation. The judgment of the Supreme Court in Bharat Barrel & Drums Mfg. Co. Private Limited, therefore, does not help the case of the petitioners.

22. In the case of Salonah Tea Co. Ltd. (supra), the matter under consideration before the Supreme Court arose out of petition under Article 226 of the Constitution of India for refund of tax illegally or unauthorisedly collected. The Supreme Court held that the writ petition normally should be filed within three years from the date of knowledge about the mistake but there is no hard and fast rule and each case depends upon the facts of the case. In our considered view, the judgment of the Supreme Court in the case of Salonah Tea Co. Limited has no bearing to the issue in hand.

23. In the case of Anil Textile Industries, relied upon by the learned counsel for the petitioners, the Rajasthan High Court issued writ and directed the ESI Corporation to refund the contribution made by the petitioners. There is no

doubt about the legal position that no tax shall be collected except by authority of law. That is what is declared by Article 265 of the Constitution of India. The legal position highlited by the Rajasthan High Court that there could be no equitable consideration in Section 72 of the Contract Act is not an issue before us. The issue before us is challenge to the constitutionality of regulation 40 and the competence of the Corporation in making such regulation. We have already held that regulation 40 is not ultra vires and the said regulation cannot be said to have been made by the Corporation beyond its competence. Regulation 40 is part of the Employees' State Insurance (General) Regulations, 1950 notified on 17.10.1950 and the same is operating for more than five decades. As a matter of fact the said provision is for the benefit of the person who has erroneously paid contribution as it enables him to claim refund as per the procedure and within time as provided therein. The said regulation is holding the field for more than five decades and for the reasons we have already indicated above, no case for declaring regulation 40 as unconstitutional and ultra vires is made out.

24. Before we close, we may notice that the petitioners are not right when they contend that it

was an admitted case that the contribution was paid by the first petitioner in excess in relation to 1029 employees from the month of June, 1985. The petitioners despite demand by the respondent No.2 never furnished the relevant details. Way back in the year 1987 by the letter dated 19.2.1987, the first petitioner was informed by the respondent No.2 that an application if any made for refund shall need factual verification by the Corporation. The present petitioners never furnished the necessary details.

25. All in all, we are satisfied that there is no merit in the writ petition. It is dismissed with no order as to costs.

(R.M. LODHA, J.)

(J.P. DEVADHAR, J.)